

That repeated flaw can be taken care of by simply deleting the offending language wherever it appears, and this Court so orders. There are, however, problems with ISE's affirmative defense ("ADs") that call for a bit more discussion:

1. AD 1 is at odds with the fundamental principles underlying Rule 8(c) and the caselaw applying it, under which a plaintiff's complaint must be accepted as truthful, with some other basis asserted to preclude or lessen liability -- see also App'x ¶ 5 to State Farm Mut. Auto. Ins. Co. v. Riley, 199 F.R.D. 276, 279 (N.D. Ill. 2001). Because CBOE's Complaint expressly charges infringement on ISE's part (something that is denied in ISE's Answer), AD 1 is stricken.
2. ADs 2 through 4 fail to comport to the concept of notice pleading that is incumbent on defendants as well as plaintiffs. Those purported ADs are stated in impermissibly general and uninformative terms and are stricken as well. Unlike AD 1, however, those matters may be reasserted in proper form (including, if need be, presentment by a motion for earlier disposition by this Court).



Milton I. Shadur
Senior United States District Judge

Date: January 8, 2013